

Stephen D. Finestone (SBN 125675)
Ryan A. Witthans (SBN 301432)
FINESTONE HAYES LLP
456 Montgomery Street, Floor 20
San Francisco, CA 94104
Tel.: (415) 421-2624
Fax: (415) 398-2820
Email: sfinestone@fhllawllp.com
Email: rwitthans@fhllawllp.com

Attorneys for Evander Frank Kane,
Debtor and Defendant

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

In re EVANDER FRANK KANE,
Debtor.

Case No. 21-50028-SLJ
Chapter 7

HOPE PARKER,
Plaintiff,
v.
EVANDER FRANK KANE,
Defendant.

Adv. Proc. No. 21-5008

CENTENNIAL BANK,
Plaintiff,
v.
EVANDER FRANK KANE,
Defendant.

Adv. Proc. No. 21-5016

DEFENDANT'S TRIAL BRIEF¹

Trial:

Date: Beginning January 23, 2023
Time: 9:00 a.m.
Ctrm: 9

¹ Unless specified otherwise, all chapter and code references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532. “Bankruptcy Rule” references are to the Federal Rules of Bankruptcy Procedure. “BK” references are to the docket in the underlying bankruptcy case.

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1 Defendant Evander Frank Kane (“Kane” or the “Defendant”) submits the following trial
2 brief for the objection to discharge complaint filed by Plaintiff Centennial Bank (“Centennial”).²

3 I. INTRODUCTION

4 Having twice unsuccessfully moved to dismiss Kane’s Chapter 7 case, Centennial is
5 pursuing an objection to Kane’s discharge.³ Centennial asserts that this Court should deny Kane
6 a discharge under various provisions of § 727. Centennial’s various theories and the applicable
7 law are discussed below. Kane denies Centennial’s allegations and requests that the Court deny
8 the relief requested and enter a judgment in his favor.

9 II. STATEMENT OF FACTS

10 Much of the factual background is familiar to the Court from matters in Kane’s main
11 bankruptcy case and will be established by the evidence at trial.

12 A. Personal Background

13 Kane was 29 years old at the time he filed this case on January 9, 2021 (the “Petition
14 Date”). He was raised in Vancouver, British Columbia, Canada, the oldest of three children of
15 Perry and Sheri Kane. He is a professional hockey player, having started playing professional
16 hockey directly out of high school at the age of eighteen. As of the Petition Date, Kane was
17 under contract with the San Jose Sharks (the “Sharks”), having played for the Sharks since 2018.
18 As of the Petition Date, Kane was living in San Jose, California, with his then-wife and nine-
19 month-old daughter. Kane currently lives in Edmonton, Alberta, Canada, with his partner and
20 two young children. He currently plays for the Edmonton Oilers hockey team.

21 B. Background to Kane’s Bankruptcy Filing

22 Though under a good contract as of the Petition Date, and having earned a sizeable sum
23 over his career, Kane was deeply in debt. This debt did not arise overnight. Kane made some
24

25 ² Hope Parker (“Parker”) filed an objection to discharge under § 727(a)(5) in *Parker v.*
26 *Kane*, Adv. Proc. No. 21-5008. Parker’s claim is joined with Centennial’s. This brief primarily
27 focuses on Centennial’s claims and only relates to Parker’s claim when it addresses § 727(a)(5).

28 ³ One of the decisions denying the motion to dismiss was appealed by Centennial and is
currently pending before the Ninth Circuit Court of Appeals.

1 wise choices in terms of real estate acquisition, but he was living beyond his means and over
2 several years had borrowed large sums from various lenders. In addition, and has been disclosed
3 in the Statement of Financial Affairs and discussed in Kane's declarations in the main case, he
4 had a significant gambling problem. Kane bet at casinos and with bookies. His gambling had a
5 negative effect on his life, financially and otherwise. Kane has received personal therapy to deal
6 with it and other matters.

7 As for Kane's borrowing, loans were arranged by Sure Sports, LLC ("Sure Sports") and
8 its principal, Leon McKenzie ("McKenzie"). Beginning in 2014, Sure Sports/McKenzie began
9 arranging loans for Kane.⁴ The loans were short in term and very expensive to obtain. With Sure
10 Sports/McKenzie acting as a broker on his behalf, Kane obtained approximately 26 loans.
11 Oftentimes, the loans simply paid off existing obligations, with Kane receiving little if any of the
12 loan proceeds, with significant amounts going to Sure Sports and the lenders for the costs
13 associated with each loan. The evidence at trial will include many of these loans, including the
14 loans from Centennial and the other large creditors in the bankruptcy case. For ease of reference,
15 a chart tracking the loans and the amounts disbursed to Kane is attached as **Attachment 1**.

16 Ultimately, Kane was unable to pay back the last series of loans. Kane retained John
17 Fiero at Pachulski Stang Ziehl & Jones, along with a CPA recommended by Mr. Fiero, in
18 October 2019. The goal was to reach a restructuring agreement with Kane's primary creditors.
19 The primary lender creditors were Zions Bancorporation, Centennial Bank, Professional Bank,
20 and South River Capital (collectively, the "Lenders"). The effort to reach a resolution with the
21 Lenders was unsuccessful. They filed suit against Kane and pursued aggressive collection
22 efforts, including asserting a security interest in Kane's salary.

23 On top of the pressure from the Lenders, as a result of the COVID-19 pandemic, a
24 portion of the National Hockey League season for 2019–2020 was canceled, which decreased
25 Kane's income for the season. Based on the ongoing litigation by the Lenders, including
26

27 ⁴ The Trustee filed suit against Sure Sports, alleging various wrongdoing in its
28 representation of Kane. Kane understands this case is pending. *See Hjelmset v. Sure Sports, LLC*, Adv. Proc. No. 22-5033.

1 Centennial's lawsuit naming the Sharks as an additional defendant in District Court in Miami,
2 Florida, and the failure to make any progress in resolving things with the Lenders, Kane decided
3 to file the instant bankruptcy case.

4 C. Post-Petition Events

5 Kane's bankruptcy case attracted considerable attention and scrutiny. Kane received
6 voluminous requests for documents from the Chapter 7 Trustee, Fred Hjelmeset (the "Trustee"),
7 and the Office of the United States Trustee ("UST"). Among other things, Kane provided bank
8 statements for all bank accounts going back to January 2020, credit card statements, prior years'
9 federal and state tax returns, mortgage statements, insurance information, information regarding
10 various business entities and business ventures, a breakdown of the use of loan proceeds, an
11 explanation of transactions reflected in bank statements and credit card statements, lease
12 agreements, loan agreements, and various other documents reflecting his debts and financial
13 history. Kane appeared for an initial meeting of creditors, which lasted approximately 2½ hours,
14 and appeared for a continued meeting lasting approximately 30 minutes, after which time the
15 Trustee concluded the meeting. Kane also sat for a multi-hour Bankruptcy Rule 2004
16 examination by Centennial, which included a sizeable document production.

17 In addition, Kane amended his Schedules and Statement of Financial Affairs several
18 times to provide additional disclosures and information. BK 17, 18, 19, 29, 30, 37, and 272.
19 Kane also provided access to his home in San Jose and real property in Vancouver, British
20 Columbia, to realtors selected by the Trustee to opine as to the current value of the real property
21 assets. Kane came to an agreement with the Trustee regarding the Vancouver real estate and
22 funds on account. BK 202, 225. The Trustee sold Kane's San Jose home. Kane stipulated to
23 numerous extensions of time with the Trustee to enable the Trustee to review information and
24 decide whether to object to Kane's discharge. BK 68, 104, 149, 197, 235, 252. The Trustee did
25 not pursue an objection to discharge.

26 Kane has conducted himself with honesty and candor throughout this case. Additional
27 facts relevant to Centennial's claims are discussed below.
28

III. LEGAL ARGUMENT

A. General Rule Applying to Objections to Discharge.

A central purpose of the Bankruptcy Code is “to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (internal quotations removed). “[E]xceptions to dischargeability should be strictly construed in order to serve the Bankruptcy Act’s purpose of giving debtors a fresh start.” *Lansdowne v. Cox (In re Cox)* (“*Cox II*”), 41 F.3d 1294, 1297 (9th Cir. 1994) (quoting *In re Kasler*, 611 F.2d 308, 310 (9th Cir. 1979)). Or stated conversely, “courts should construe § 727 liberally in favor of debtor and strictly against parties objecting to discharge.” *Bernard v. Sheaffer (In re Bernard)*, 96 F.3d 1279, 1281 (9th Cir. 1996).

Centennial has twice tried unsuccessfully to dismiss Kane’s Chapter 7 case. Some courts measure § 727(a)-relevant conduct against the standards applied to determine dismissal of a bankruptcy petition on the ground that it was filed in bad faith. *See Manning v. Watkins*, 474 B.R. 625, 642 (N.D. Ind. 2012). That standard is essentially whether, in reviewing the Debtor’s conduct as a whole in relation to the case, the Court is left with the impression that the Debtor sought to thwart creditors, trustees, or the Court. *Id.* As the evidence will show, Kane has not.

B. Centennial’s § 727(a)(2) Claim

Centennial objects to Kane discharge under § 727(a)(2)(A). This portion of the Code denies a debtor a discharge for transferring or concealing property within one year of the Petition Date. “A party seeking denial of discharge under § 727(a)(2) must prove two things: ‘(1) a disposition of property, such as transfer or concealment, and (2) a subjective intent on the debtor’s part to hinder, delay or defraud a creditor through the act [of] disposing of the property.’” *Retz v. Samson (In re Samson)*, 606 F.3d 1189, 1200 (9th Cir. 2010) (quoting *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997)).

Centennial claims that Kane owns or owned a condominium in Vancouver that was not listed on Schedule A/B or identified as having been transferred within the year prior to the

1 Petition Date. The evidence at trial will show that Centennial’s claim is without merit, as Kane
2 neither owned nor transferred any interest in the condominium. As such, Centennial’s claim
3 under § 727(a)(2)(A) fails.

4 C. Centennial’s § 727(a)(3) Claim

5 Section 727(a)(3) acts to deny a discharge to a debtor that “has concealed, destroyed,
6 mutilated, falsified, or failed to keep or preserve any recorded information, including books,
7 documents, records, and papers, from which the debtor’s financial condition or business
8 transactions might be ascertained, unless such act or failure to act was justified under all of the
9 circumstances of the case.” The purpose of § 727(a)(3) is to require a debtor to “present
10 sufficient written evidence which will enable his creditors reasonably to ascertain his present
11 financial condition and to follow his business transactions for a reasonable period in the past.”
12 *Cox v. Lansdowne (In re Cox)* (“*Cox I*”), 904 F.2d 1399, 1402 (9th Cir. 1990). The initial burden
13 of proof under § 727(a)(3) is on the plaintiff. Bankruptcy Rule 4005. To state a prima facie case
14 under § 727(a)(3), a creditor objecting to discharge must show “(1) that the debtor failed to
15 maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain
16 the debtor’s financial condition and material business transactions.” *Cox II*, 41 F.3d at 1296.

17 If, and only if, a creditor is able to establish a prima facie case, does the burden shift to
18 the debtor, who must then justify the inadequacy or nonexistence of the records in order to
19 maintain his discharge. *Id.* The court should consider all circumstances of the case to determine
20 if a failure to keep records was justified. *Cox I*, 904 F.2d at 1403.⁵ In the instant case, these may
21 include, among other factors the Court deems relevant, (1) the debtor’s intelligence and
22 educational background; (2) his experience in business and financial matters; (3) the extent of his
23 involvement in managing his business and financial affairs; (4) his reliance on other individuals

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25 ⁵ In the case of a debtor who had relied on her husband to keep records, the Ninth Circuit
26 has identified factors including (1) debtor’s intelligence and educational background; (2) her
27 experience in business matters; (3) extent of her involvement in business for which discharge is
28 sought; (4) reliance on her husband to keep records, including what, if anything, debtor saw or
was told that indicted that her husband was keeping records; (5) nature of marital relationship;
and (6) any recordkeeping or inquiry duties imposed upon debtor by state law. *Cox I*, 904 F.2d at
1403 n.5; *Cox II*, 41 F.3d at 1297–98.

1 to keep records, including what, if anything, he saw or was told that indicated that other
2 individuals were keeping records; (5) the nature of his relationship with those other individuals;
3 and (6) any recordkeeping or inquiry duties imposed upon him by state law.⁶ The Ninth Circuit
4 has held the justification defense hinges on “whether others in like circumstances would
5 ordinarily keep [records].” *Caneva v. Sun Cmtys. Operating Ltd. P’ship (In re Caneva)*, 550 F.3d
6 755, 763 (9th Cir. 2008) (quoting *Cox II*, 41 F.3d at 1299).

7 Two unpublished B.A.P. cases are instructive, even if they are not binding on this Court.
8 The first is *Rafsanjani v. Kuchecki (In re Kuchecki)*, 2010 Bankr. LEXIS 5045, 2010 WL
9 6259966 (B.A.P. 9th Cir. Nov. 29, 2010). In that case, the debtor ran an automotive repair shop
10 and became indebted to his cousin before filing for bankruptcy. In his bankruptcy case, the
11 debtor produced only eight months of bank statements. The creditor asserted at trial (and on
12 appeal) that the records produced by the debtor were insufficient to ascertain his true financial
13 condition.⁷ The bankruptcy court stated, and the B.A.P. affirmed, that this sort of argument was
14 not evidence; it was mere speculation. The creditor provided no explanation as to how more
15 complete bank statements were needed to ascertain the debtor’s financial condition.

16 By contrast, the second unpublished B.A.P. case is *Sfadia v. Bongkuk Int’l, Inc. (In re*
17 *Sfadia)*, 2007 Bankr. LEXIS 4933, 2007 WL 7540987 (B.A.P. 9th Cir. Sep. 5, 2007). The debtor
18 in that case owned a steel fabrication business. The creditor sold materials to the business, and
19 the business failed to pay, eventually resulting in a judgment of approximately \$1 million. After
20 failing to pay, but before the creditor obtained a judgment, the debtor sold his business to a third
21 party. In consideration, the third party agreed to pay \$300,000 (of which \$200,000 was paid and
22 \$100,000 was owed) and assume the business’s debts of approximately \$1 million. None of this
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24 ⁶ See *Cox I*, 904 F.2d at 1403 n.5; *Cox II*, 41 F.3d at 1297–98.

25 ⁷ The creditor argued that the records produced by the debtor “are not sufficient to
26 ascertain his true financial condition because, although the partial bank statements show that the
27 tax return and income statement under-report the amount of revenue flowing into the business, it
28 is impossible to determine by how much because there are only eight months of bank statements.
As a result, it is impossible to ascertain the true value of [the debtor’s] business.” *Kuchecki*, 2010
Bankr. LEXIS 5045 at *23–24.

1 was documented, and none of this was reported on the debtor's bankruptcy schedules. Moreover,
2 the debtor claimed to have left all of his books and records with the business when he sold it, and
3 had not seen them since. The B.A.P. affirmed the bankruptcy court's ruling that the debtor was
4 barred from receiving a discharge by § 727(a)(3). It found that it was not reasonable that a person
5 would leave all business records, or that he would not retain a copy of the sales agreement.⁸

6 A debtor must only "present sufficient written evidence which will enable his creditors
7 reasonably to ascertain his present financial condition and to follow his business transactions for
8 a reasonable period in the past." *Caneva*, 550 F.3d at 761. A debtor's "duty to keep records is
9 measured by what is necessary to ascertain [his] financial status." *Moffett v. Union Bank*, 378
10 F.2d 10, 11 (9th Cir. 1967). In *Kistler v. Fader (In re Fader)*, 414 B.R. 640, 645 (Bankr. N.D.
11 Cal. 2009) (Montali, J.), the court recognized that § 727(a)(3) does not require absolute
12 completeness in the records, but a debtor must keep and preserve records that will enable his
13 creditors to accurately ascertain his financial condition and business transactions. Moreover, the
14 B.A.P. in *Sfadia* noted that "[d]ebtors are required to keep records for a 'reasonable' period of
15 time for § 727(a)(3) purposes, and a court's determination of 'reasonableness' depends on the
16 particular facts and circumstances of each case."⁹ 2007 Bankr. LEXIS 4933 at *31.

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18 ⁸ "Debtor's argument that he disclosed the disposition of the \$200,000 to the trustee or
19 during the Bankruptcy Rule 2004 exam, or that all the records were left with FTM [the sold
20 business] and then lost or destroyed, does not excuse his failure to keep and produce financial
21 records from the time he owned and sold FTM. Debtor proffers no plausible argument for the
22 propositions, necessary for him to prevail, that it is reasonable to sell a business having several
23 hundred thousand dollars' worth of inventory for over a million dollars, with a hundred thousand
dollars or more still owing, on an oral agreement and without keeping any records whatsoever, or
that it is justifiable to leave whatever records there were with the purchaser." *Sfadia*, 2007 Bankr.
LEXIS 4933 at *33.

24 ⁹ The unpublished B.A.P. decision of *In re Nevett*, 2021 Bankr. LEXIS 1781, 2021 WL
25 2769799 (B.A.P. 9th Cir. July 1, 2021), provides persuasive guidance on how to determine the
26 limits of a reasonable lookback period. Though the debtor's discharge was ultimately denied, the
27 B.A.P. affirmed the bankruptcy court's finding that the debtor was justified in not keeping
28 records pertaining to a certain loan that was comparatively small, that was taken out five years
before his bankruptcy petition, and that had been largely repaid. This limitation undercuts
Centennial's request to expand the lookback period to cover the years prior to the Lenders' loans
to Kane, and into transactions that were paid off by the Lenders' loans or earlier refinances.

1 Regarding discovery requests generally and the issue raised in Kane’s motion in limine, a
2 failure to produce documents in response to a discovery request, alone, does not justify denial of
3 discharge under § 727(a)(3). *Salehi v. Glob. Auto. Grp., Inc. (In re Salehi)*, B.A.P. No. EC-13-
4 1171-TaKuJu, 2014 Bankr. LEXIS 2649, at *25–27 (B.A.P. 9th Cir. June 9, 2014)
5 (unpublished). The B.A.P. in *Salehi* explained that the creditor, Global Automotive, could have
6 obtained written copies of the debtor’s bank records through formal discovery in the adversary
7 proceeding if it was not satisfied with what he produced in response to his Bankruptcy Rule 2004
8 examination. Similarly, in *Kucheki*, the creditor did not seek to obtain additional documents
9 through discovery, and, even if he did and “[e]ven if [the debtor] did not have them, they were
10 likely available through [the debtor’s] bank.” 2010 Bankr. LEXIS 5045 at *24.

11 As will be presented at trial, given the circumstances of the case, Kane provided
12 considerable explanation of and documentation for his past financial transactions for a
13 reasonable period of time.

14 D. Centennial’s § 727(a)(4) Claim

15 Centennial asserts Kane made the following “false oaths,” which allegedly justify
16 denying him a discharge:

- 17 1. Centennial argues that Kane’s signing of his Petition, which included the checked box
18 answering “Yes” in question 16.b, that his debts were primarily business debts,
19 constitutes a false oath.
- 20 2. Centennial asserts that Kane made a false oath because his Statement of Financial
21 Affairs does not disclose any “gifts” to his family members in response to question
22 13, even though his Schedule J discloses \$15,000 in monthly support to his family
23 members at line 19.
- 24 3. Centennial claims that Kane made a false oath by listing his income in Schedule I on
25 the Petition Date at \$0, somehow ignoring the lengthy explanation of his future salary
26 attached to Schedule I.

1 4. Centennial claims that Kane owns or owned a condominium in Vancouver that was
2 not listed on Schedule A/B or identified as having been transferred within the year
3 prior to the Petition Date.

4 Turning to the law, § 727(a)(4)(A) provides the court shall grant the debtor a discharge,
5 unless “the debtor knowingly and fraudulently, in or in connection with the case—made a false
6 oath or account.” “The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and
7 creditors have accurate information without having to conduct costly investigations.” *Khalil v.*
8 *Developers Surety and Indemnity Co. (In re Khalil)*, 379 B.R. 163, 172 (B.A.P. 9th Cir. 2007),
9 *aff’d*, 578 F.3d 1167 (9th Cir. 2009) (quoting *Fogal Legware of Switz., Inc. v. Wills (In re Wills)*,
10 243 B.R. 58, 63 (B.A.P. 9th Cir. 1999)).

11 A plaintiff objecting to a debtor’s discharge under § 727(a)(4)(A) bears the burden to
12 prove by a preponderance of the evidence that “(1) [the d]ebtor made . . . a false statement or
13 omission, (2) regarding a material fact, and (3) did so knowingly and fraudulently.” *Khalil*, 379
14 B.R. at 172 (citing *Searles v. Riley (In re Searles)*, 317 B.R. 368, 377 (B.A.P. 9th Cir. 2004),
15 *aff’d*, 212 F. App’x 589 (9th Cir. 2006); *Roberts v. Erhard (In re Roberts)*, 331 B.R. 876, 882
16 (B.A.P. 9th Cir. 2005), *aff’d*, 241 F. App’x 420 (9th Cir. 2007)).

17 A false oath may involve a false statement or an omission in the debtor’s Schedules or
18 Statement of Financial Affairs. *Retz*, 606 F.3d at 1196 (quoting *Khalil*, 379 B.R. at 172).
19 “Materiality” is “conceived of broadly, as including any fact that bears a relationship to the
20 debtor’s business transactions or estate, or concerns the discovery of assets, business dealings, or
21 the existence and disposition of the debtor’s property.” *Murtaza v. Sigmund (In re Murtaza)*,
22 B.A.P. No. CC-15-1075-KuFTa, 2016 Bankr. LEXIS 1092, at *10 (B.A.P. 9th Cir. Apr. 5,
23 2016); *Khalil*, 379 B.R. at 173 (quoting *Wills*, 243 B.R. at 62). “Knowingly” means deliberate
24 and conscious, while the elements of “fraudulently” as used in this statute has a meaning similar
25 to common law fraud, but materiality replaces the elements of reliance and proximate causation
26 of damages. *Roberts*, 331 B.R. at 883–84. Thus, a creditor must show that the debtor made false
27 statements or omissions that at the time he knew were false, with the intention and purpose of
28 deceiving the creditors. *Id.*

1 The debtor's intent must be actual, not constructive, and may be established by
2 circumstantial evidence or by inferences from course of conduct. *Id.* (citing *Devers v. Bank of*
3 *Sheridan (In re Devers)*, 759 F.2d 751, 753 (9th Cir. 1985)). The Ninth Circuit B.A.P. explained
4 the matter as follows: "[t]he essential point is that there must be something . . . which suggest[s]
5 that the debtor intended to defraud creditors or the estate. For instance, multiple omissions of
6 material assets or information may well support an inference of fraud if the nature of the assets
7 or transactions suggests that the debtor was aware of them at the time of preparing the schedules
8 and that there was something about the assets or transactions which, because of their size or
9 nature, a debtor might want to conceal." *Khalil*, 379 B.R. at 175 (quoting *Garcia v. Coombs (In*
10 *re Coombs)*, 193 B.R. 557, 565–66 (Bankr. S.D. Cal. 1996)).

11 Ninth Circuit case law holds that prompt correction of an inaccuracy or omission may be
12 evidence probative of lack of fraudulent intent. *Searles*, 317 B.R. at 377 (citing *Beauchamp v.*
13 *Hoose (In re Beauchamp)*, 236 B.R. 727, 733 (B.A.P. 9th Cir. 1999), *aff'd.*, 5 F. App'x 743 (9th
14 Cir. 2001)). Moreover, a debtor who acts in reliance on the advice of his attorney may lack the
15 fraudulent intent required to deny him a discharge of his debts. *Retz*, 606 F.3d at 1199.

16 Finally, an important consideration is whether allegedly omitted information is disclosed
17 elsewhere in debtor's filing, as such disclosure weighs against a creditor's case. *See Spohn v.*
18 *Carney (In re Carney)*, 558 B.R. 250, 257–58 (Bankr. N.D. Ill. 2016). A disclosure of
19 information elsewhere in the debtor's filings is suggestive of confusion rather than intent to hide
20 information. *Id.* at 261.

21 The evidence at trial will indicate that the alleged statements are not false in the first
22 instance. Even were the Court to ultimately find any of the statements were inaccurate (which
23 Kane disputes), any inaccuracies or omissions were not material, knowing or fraudulent.

24 E. Centennial and Parker's § 727(a)(5) Claim

25 Section 727(a)(5) provides that a debtor may be denied a discharge for failing to "explain
26 satisfactorily . . . any loss of assets or deficiency of assets to meet the debtor's liabilities." The
27 Ninth Circuit set forth the analysis for a claim under § 727(a)(5) in *Retz*: "an objecting party
28 bears the initial burden of proof and must demonstrate: (1) debtor at one time, not too remote

1 from the bankruptcy petition date, owned identifiable assets; (2) on the date the bankruptcy
2 petition was filed or order of relief granted, the debtor no longer owned the assets; and (3) the
3 bankruptcy pleadings or statement of affairs do not reflect an adequate explanation for the
4 disposition of the assets.” 606 F.3d at 1205 (9th Cir. 2010) (quoting *Olympic Coast Invest, Inc. v.*
5 *Wright (In re Wright)*, 364 B.R. 51, 79 (Bankr. D. Mont. 2007)). A debtor’s testimony may
6 provide satisfactory evidence to explain the disposition of assets. *Radecki v. Snider (In re*
7 *Snider)*, 2019 Bankr. LEXIS 683, 2019 WL 5883623 (Bankr. D. Nev. Feb. 28, 2019). Whether a
8 debtor satisfactorily explains a loss of assets is a question of fact. *Ward v. Thompson (In re*
9 *Thompson)*, 2009 Bankr. LEXIS 4530, at *15, 2009 WL 7751298 (B.A.P. 9th Cir. Apr. 20,
10 2009) (citations omitted). The bankruptcy court has a great deal of discretion in determining
11 whether an explanation is satisfactory so as to defeat the objection. *Id.*

12 Therefore, to make a claim for relief under § 727(a)(5), Centennial must prove the
13 disappearance of substantial assets, at which point the burden shifts to the debtor to explain the
14 loss of those assets. *See Hewitt v. Lemieux (In re Lemieux)*, Adv. Proc. No. 16-03065, 2017
15 Bankr. LEXIS 3272, at *29 (Bankr. N.D. Cal. Sep. 27, 2017) (Blumenstiel, J.) (citing *Fader*, 414
16 B.R. at 645).

17 Centennial points principally to the \$20 million in compensation that Kane supposedly
18 received in the last three years preceding the Petition Date, some \$14,350,000 in funds borrowed
19 from the Lenders during that same time period, and \$2,150,000 in various unsecured claims
20 listed in the schedules. As will be presented at trial, Centennial cannot make its prima facie case.
21 As a preliminary matter, Centennial’s assertion that Kane received \$20 million in compensation
22 in the three years pre-petition fails to account for deductions and withholdings that were part of
23 his Player’s Contract with the Sharks and a result of the COVID-19 cancelations. Furthermore,
24 its estimation of borrowed funds fails to take into account the net amount Kane actually received,
25 as the loans primarily paid off existing debt.

26 The case of *United States Tr. v. Rojas (In re Rojas)*, 2011 Bankr. LEXIS 106, at *10–13,
27 2011 WL 66129 (Bankr. S.D. Cal. Jan. 3, 2011), is instructive. In *Rojas*, the plaintiff pointed to
28 considerable deposits into various accounts, as well as cash withdrawals. The court explained

1 that deposits alone do not establish evidence that a certain amount of assets existed at a certain
2 point in time. Looking solely at the deposits, without evidence of the source or of withdrawals,
3 did not identify a particular asset for which the debtor would be required to account. A deposit is
4 simply a transaction; it is not necessarily a net gain of assets to the debtor. The *Rojas* court
5 reasoned if the plaintiff wanted to rely on the accounts and their contents to support its
6 § 727(a)(5) claim, it had to provide evidence that (1) on a date certain, not too remote from the
7 petition date, the debtor's accounts had balances of \$X; (2) that as of the petition date, the
8 accounts had balances of less than \$X; (3) that the schedules and statements do not provide an
9 adequate explanation for the disposition of the assets; and (4) the plaintiff requested explanation
10 from the Debtor about the missing assets. Here, as will be established at trial, most if not all of
11 the loans identified by Centennial (including Centennial's) were used to pay off existing
12 obligations. Moreover, this is not a case where Kane pre-petition received a large sum from an
13 outside source and was unable to account for it as of the Petition Date. *See Rojas*, 2011 Bankr.
14 LEXIS 106 at *12. Rather, the exhibits and testimony at trial will show Kane earned a salary
15 over a period of time that was insufficient to meet the high expenses of his life and he obtained
16 loans to pay off existing obligations.

17 The courts in this District have long adhered to the principle of a "fresh start" and the
18 presumption in the debtor's favor. *See Fader*, 414 B.R. at 646. In *Fader*, even without adequate
19 records, the court held that *Caneva* and *Cox II* do not foreclose adequate explanations, and Judge
20 Montali accepted the debtor's explanation that he expended over \$200,000 in proceeds of his
21 friends' personal loans and funds from his wholly owned LLC, drawn from ATMs or cashed
22 from bank accounts, to run his business and pay personal expenses. *Id.* at 645–46. The *Fader*
23 court found the debtor credible, and his testimony was not rebutted. *Id.* at 646. In *Lemieux*,
24 where a debtor withdrew funds from his wholly owned company and admitted that he did not
25 keep records of how he spent that money, Judge Blumenstiel found the debtor adequately
26 explained the disposition of the withdrawals toward his personal expenses. 2017 Bankr. LEXIS
27 3272 at *30–31. The *Lemieux* court stated the debtor's poor accounting skills did not justify
28 denial of his discharge, particularly where the debtor's methods for estimating those expenses

1 were reasonable.¹⁰ *Id.* at 31. “[Section] 727(a)(5) is not appropriately used to deny a discharge to
2 business operators who through inadvertence, lack of competence, or both, maintain less than
3 pristine financial records.” *Id.* (quoting *United States Tr. v. Knowling (In re Knowling)*, 2011
4 Bankr. LEXIS 4080, 2011 WL 5024298 (Bankr. D. Or. Oct. 20, 2011)).

5 In *Davis v. Battistella (In re Battistella)*, Adv. Proc. No. 13-5137, 2016 Bankr. LEXIS
6 1964, at *5 (Bankr. N.D. Cal. May 9, 2016) (Jaroslovsky, J.), where the UST argued the debtor
7 could not satisfactorily explain the loss of \$1.6 million he received from investors, Judge
8 Jaroslovsky remarked it did not take much of a “leap of faith” to believe a car dealer debtor who
9 testified that he sustained large losses while trying to keep his business afloat at the height of the
10 Great Recession, and the court did not believe the assets were “stuffed in a mattress somewhere.”
11 And the Ninth Circuit B.A.P. in *Thompson* considered the debtor’s testimony at trial and found
12 no clear error in the bankruptcy court’s decision that the debtor explained in sufficient detail that
13 he was out of work, he used the refinance proceeds to pay bills owed to several people, and he
14 made mortgage payments. 2009 Bankr. LEXIS 4530 at *16–18.

15 Centennial cannot show any identifiable assets that went missing or are unaccounted for,
16 but even if there has been a dissipation of Kane’s assets, the exhibits and testimony at trial will
17 satisfactorily explain where Kane’s earnings and the loan proceeds went, and why Kane had
18 insufficient assets to pay his debts.

19 IV. CONCLUSION

20 Based on the legal argument presented above and the evidence to be presented at trial,
21 Evander Kane respectfully requests that the Court deny Centennial the relief requested and enter
22 judgment in his favor.
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25

26 ¹⁰ The debtor, Mr. LeMieux, testified that his Exhibit J represented his best estimate of
27 the disposition of cash withdrawals from his wholly owned company during the pre-petition
28 period emphasized by the creditors. The debtor maintained that many of his expenses were fixed
and that he had copies of cashier’s checks to corroborate his estimates, which he believed to be
fairly accurate, if not exactly correct. *Lemieux*, 2017 Bankr. LEXIS 3272 at *12.

1 Dated January 17, 2023

FINESTONE HAYES LLP

2
3 /s/ Stephen D. Finestone

4 Stephen D. Finestone
5 Attorneys for Evander Frank Kane,
6 Debtor and Defendant
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